IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 56 OF 1999.

Meena Fernandes,
Age: 35, Occ.: Liquor Selling,
R/o.451/4, Shams Cottage,
Deolali Camp, Taluka & Dist.
Nashik. ... Appellant.

Versus.

1. Sheela Ingatius Fernandes,
   @ Shamim Nasirkhan, Age: 40
   R/o.17, Housan Road, Deolali
   Camp, and House No.451/2 &
   House No.451/3, Taluka &
   Dist. Nashik.

2. Trambak Sahebrao Patil,
   Age: 40, Occ.: Liquor Selling
   and hotel, R/o. Vaghadi,
   Panchavati, Nashik.

3. Shivaji Sahebrao Patil,
   Age: 35 yrs., Occ.: Liquor
   Selling, R/o. As above.

4. Rekha Trambakrao Patil,
   Age: 32, Occ.: Household,
   R/o. As above. ... Respondents.

Shri Hardas holding for Shri P.N.Joshi for the Appellant.

Shri Salunke for Shri P.B.Shah for the Respondent No.1.

CORAM : ABHAY S.OKA, J.

DATED : 21st April, 2007.

ORAL JUDGMENT.:

1. Submissions of the learned Counsel appearing for the parties were heard on the last date.

2. The Appellant is the original Defendant No.1 and the Respondent No.1 herein is the original Plaintiff. On 23rd June 1988 a decree was passed by the trial Court in favour of the 1st Respondent granting a declaration and injunction. An appeal was preferred against the said decree in this Court. The Appeal was disposed of as withdrawn on 24th July 1998 with liberty to the Appellant to take out an appropriate application under Order IX of the Code of Civil Procedure, 1908. Accordingly, the Appellant filed an application under Order IX Rule 13 of the said Code which has been rejected by the trial Court by order dated 2nd December 1998. The learned trial Judge rejected the said application as well as the application for condonation of delay on the ground that the decree in the suit was passed by invoking the provisions of sub-rule (2) of Rule 5 of Order VIII of the said Code and therefore, in view of the settled position of law, the Application made by the Appellant under Order IX Rule 13 of the said Code was not maintainable.

3. The learned Advocate for the Appellant invited my attention to the decree passed by the trial court and pointed out that the said decree is neither under Rule 5 of Order VIII nor under Rule 10 of Order VIII of the

said Code. He placed reliance on the order dated 24th July 1998 passed by this Court in the First Appeal.

4. The learned Advocate for the 1st Respondent submitted that on a plain reading of the decree, it is obvious that the same has been passed by invoking the provisions of Rule 5 of Order VIII of the said Code and hence the Application made by the Appellant under Rule 13 of Order IX of the said Code was not maintainable.

5. I have considered the submissions. The decree passed by the trial Court was challenged by the Appellant by preferring First Appeal No.658 of 1998 in this Court. By order dated 24th July 1998 passed by this Court, it was observed that the Judgment and Decree has not been passed under Rule 5 of Order VIII of the said Code and in fact Order XVII of the said Code would be attracted and therefore, it will be open for the Appellant to take steps under Order IX of the said Code.

6. The finding recorded by the trial Court in the impugned order is contrary to what has been held by this Court by order dated 24th July 1998. In fact on the basis of the said order of this Court holding that an Application under Rule 13 of Order IX of the said Code will be competent, the Application was filed by the Appellant ought to have been allowed. Apart from the

fact that the conclusion reached by the trial Court is contrary to what has been held by this Court, on a plain reading of the Judgment in the suit, it appears that the 1st Respondent/Plaintiff led oral evidence by examining himself as well as one witness. Such a decree cannot be said to have been passed only on the ground of default in filing the written statement. Thus in my view, the order of the trial Court is completely erroneous and the same deserves to be quashed and set aside. The learned trial Judge by the impugned order has rejected the Application for condonation of delay and the main Application for setting aside the ex-parte decree only on the ground that the same were not maintainable. However, as held above, the Application under Order IX Rule 13 of the aforesaid Code was certainly maintainable. Accordingly the said Applications will have to be restored and heard on merits.

7. Hence the following order is passed:

(i) The impugned Judgment and Order dated 2nd December 1998 is quashed and set aside. Civil Miscellaneous Application No.149 of 1998 is restored to file. The learned trial Judge will hear and decide the said Application in accordance with the law. It is made clear that the Application

invoking order IX Rule 13 of the said Code is maintainable in law.

(ii) The Appeal is allowed in the above terms.

(iii) The trial Court will dispose of the Application as expeditiously as possible and preferably on or before 31st October, 2007.

Judge.